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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CASE CORPORATION,
Petitioner,

v.

DANIEL FREEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

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December 3, 1997

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, *amicus curiae* the Chemical Manufacturers Association ("CMA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioner. The consent of the attorney for the Petitioner has been obtained, and a copy of the letter evidencing such consent has been provided to the clerk of this Court. The consent of the attorney for the Respondent was requested but refused.

INTEREST OF *AMICUS CURIAE*

CMA is a non-profit trade association whose member companies produce, market, and use industrial chemicals. Its members comprise more than 90 percent of the productive capacity for basic industrial chemicals in the

United States. The chemical industry employs over a million workers in this country, and produces about 1.9 percent of the U.S. gross domestic product. On a value-added basis, it is about 10.3 percent of U.S. manufacturing. It accounts for more than one dollar of every ten dollars of U.S. goods that are exported, which in 1996 amounted to over 60 billion dollars.

The interest of CMA in this case arises from the fact that its member companies routinely face unsubstantiated expert testimony. Such testimony often causes defendants to pay for damages and injuries they did not cause. The American consumer, in turn, also pays: prices go up and products are never developed or never brought to market. This Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has curtailed the use of such unsubstantiated expert testimony. The beneficial impact of *Daubert*, however, is threatened by the Fourth Circuit's decision in the instant case.

Because the expert evidence issue is so important, CMA monitors cases in the area and regularly files *amicus* briefs in significant cases. Thus CMA provides well-informed insight from the perspective of one of the major sectors of the American economy.

Respectfully submitted,

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QUESTION PRESENTED

1. Whether the explanation of Federal Rule of Evidence 702 provided by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies to expert testimony if an expert purports to base his or her conclusions solely on experience and training, and not on the methodology and reasoning of the expert's field or discipline.

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BRIEF *AMICUS CURIAE* OF THE CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

Amicus curiae respectfully prays that this Court grant review in this case. No counsel for any party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of the brief. The consent of the attorney for the Petitioner has been obtained. A copy of the letter evidencing such consent has been provided to the clerk of this Court. The consent of the attorney for the Respondent was requested but refused.

INTEREST OF *AMICUS CURIAE*

The Chemical Manufacturers Association ("CMA") is a non-profit trade association whose member companies produce, market, and use industtrial chemicals. Its members comprise more than 90 percent of the productive capacity for basic industrial chemicals in the United States. The chemical industry employs over a million workers in this country, and produces about 1.9 percent of the U.S. gross domestic product. On a value-added basis, it is about 10.3 percent of U.S. manufacturing. It accounts for more than one dollar of every ten dollars of U.S. goods that are exported, which in 1996 amounted to over 60 billion dollars.

CMA is concerned about the Fourth Circuit's decision in this case because the court declined to apply the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to the testimony of an expert who articulated no reasoning or methodology, and provided no explanation for his conclusions. The expert's testimony derived only from his "experience and training." *Daubert*, however, requires federal trial judges to act as gatekeepers to determine "whether the reasoning or methodology underlying [an expert's] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The Fourth Circuit's approach would allow an expert to avoid gatekeeping scrutiny simply by claiming he or she used no methodology at all. *See Freeman v. Case*, 118 F.3d 1011, 1016 n.6 (4th Cir. 1997).

Because its member companies face putative expert testimony from many fields and in many different kinds of cases, the Fourth Circuit's "experience and training" exception to *Daubert* raises grave concerns for CMA. When experts are allowed to give opinions in court that are not based on the methods and principles of their field of expertise, defendants sometimes pay for injuries or dam-

ages they did not cause. The American consumer also pays: prices go up and some products are never developed or never brought to market.

Daubert has greatly reduced these problems by focusing attention on whether experts can provide reasoned explanations for how they reach their conclusions. The Fourth Circuit, however, would allow litigants a blatantly obvious and easy end run around *Daubert*. This approach was first announced by the Tenth Circuit in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996), but it has since been explicitly rejected by the Fifth Circuit in *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997). Other Circuits also have taken an approach closely akin to *Watkins*. *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir.), *cert. denied*, 117 S.Ct. 73 (1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir.), *cert. denied*, 117 S.Ct. 1552 (1997). Thus there is now a clear split in the Circuits regarding the Fourth Circuit's holding in this case. This split should be resolved in favor of gatekeeping and against the supposed "experience and training" exception to *Daubert*.

STATEMENT OF THE CASE

At one level this case is about a tractor accident and an engineering expert witness who ventured opinions about its design without explaining his methodology or his reasoning. Its importance, however, goes far beyond tractor accidents and engineering. The Fourth Circuit's holding that the admissibility of this expert testimony was not governed by *Daubert* raises serious questions about when and how courts should control the use of expert evidence.

The accident in this case involved a tractor equipped with a mower attachment. The tractor was manufactured by the Defendant (here Petitioner) Case Corporation ("Case"). The Plaintiff (here Respondent) was injured

while operating the tractor, which lurched over the edge of an embankment when the Plaintiff attempted to check the condition of the blades after hitting a rock. He had not turned off the engine, and though he jumped off the tractor, it rolled on top of him and he was struck by the mower blades. He alleged that a design defect in the configuration of the brake and accelerator pedals and/or the lack of an "operator presence control" caused this accident.

In support of his pedal configuration claim the Plaintiff proffered the testimony of a mechanical engineering expert, who opined that the position of the tractor's pedals constituted a design defect. The District Court denied Case's motion in limine seeking to exclude the engineering expert's testimony under the authority of *Daubert*, and the case proceeded to a Plaintiff's verdict.

Though still declining to apply *Daubert*, the District Court granted the Defendant's motion for judgment as a matter of law, holding that the expert testimony failed to meet the Plaintiff's burden of proof. The Fourth Circuit reversed, finding that the expert's testimony satisfied the Plaintiff's burden according to Virginia authority. Moreover, the Fourth Circuit affirmed the rejection of Case's *Daubert* challenge, holding *Daubert's* requirement that expert evidence must be based on valid reasoning or methodology did not apply because the expert had not articulated *any* reasoning or methodology. His testimony was not subject to gatekeeping because "where an expert relies on his experience and training and not a particular methodology to reach his conclusions, 'application of the *Daubert* [analysis] is unwarranted.' " *Freeman v. Case Corp.*, 118 F.3d 1011, 1016 n.6 (4th Cir. 1997) (alteration in original) (quoting *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996)).

SUMMARY OF ARGUMENT

The Fourth Circuit's reading of *Daubert* in this case raises a grave and fundamental question. Can *Daubert* be avoided if an expert simply disavows any reasoning or methodology and claims his or her opinion was based only on "experience and training?" The answer to this question must be no.

The ill-conceived "experience and training" test for admissibility would allow experts to avoid judicial gatekeeping when they cannot or will not explain the reasoning or methodology underlying their opinions. This test apparently would exclude the expert who ventures a bad explanation, but would admit testimony based on no explanation at all. Other courts that have considered the issue have recognized that when experts do not explain how they reach their conclusions the validity of their reasoning or methodology cannot be assessed by either the court or the jury, and their testimony should be excluded.

The supposed "experience and training" exception to *Daubert* is an important issue. The Fourth Circuit's holding, which misconceives the way in which engineers do their work, could be extended to other fields of expertise as well. Thus, it threatens the very foundation of *Daubert*. The Fourth Circuit's decision to exempt the expert testimony in this case from *Daubert* analysis was erroneous and should be reversed.

ARGUMENT

I. THE FOURTH CIRCUIT'S "EXPERIENCE AND TRAINING" EXCEPTION WOULD ALLOW IMPROPER AVOIDANCE OF *DAUBERT*, AND IT CONFLICTS WITH HOLDINGS FROM OTHER CIRCUITS.

The ill-conceived "experience and training" test for admissibility allows an expert to avoid judicial gatekeeping when the expert does not explain the reasoning or

methodology underlying his or her opinions. This approach would effectively eliminate *Daubert*, but it conflicts with holdings from other circuits that have recognized the need for experts to provide reasoned explanations for their conclusions.

The special knowledge that expert witnesses provide is comprised of both facts and the ability to reach conclusions based on those facts and on other evidence in a case.[1] For example, a chemist investigating the environmental effects of an oil spill is already knowledgeable about the density and solubility of certain types of oil. This information, in conjunction with case-specific factors such as the type of oil, water temperature, and wind conditions, provides the factual predicate for the expert's conclusions.[2] Yet, it is the expert's application of scientific principles to these facts that ultimately leads to a reasoned explanation for those conclusions.[3] *Daubert* requires a court to determine if that explanation is in fact valid and reliable.

In the instant case, the Plaintiff's engineering expert testified that a design defect existed but offered no reasoning or methodology for his conclusion. The Fourth Cir-

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[1] As this Court noted in *Daubert*, "[the word 'knowledge'] 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.' *Webster's Third New International Dictionary* 1252 (1986)." 509 U.S. at 590.

[2] *See* Bert Black, et al., *The Law of Expert Testimony—A Post-*Daubert *Analysis, in* EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 9, 26 (Bert Black and Patrick W. Lee eds., 1997).

[3] *See also Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir.), *cert. denied*, 513 U.S. 1111 (1995) (noting hypothetically that in order to prove bumblebees typically take off into the wind, the testimony of a beekeeper who had observed bees for many years would be appropriate, but to explain *how* bumblebees fly, and *why* they take off into the wind, would require a different kind of expert, such as an aeronautical engineer).

cuit's decision not to apply *Daubert* and to admit this testimony permits experts to escape *Daubert* scrutiny simply by saying they used no methodology or reasoning. Several courts, however, have explicitly rejected the notion that unexplained and untested conclusions are admissible.[4] Most notably, the Fifth Circuit renounced the supposed "experience and training" exception to *Daubert*, stating that "it seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."[5] Thus, if allowed to stand, the supposed "experience and training" exception to *Daubert* woud permit experts to avoid gatekeeping when it is most warranted.

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[4] *See, e.g., Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.), *cert. denied*, 117 S.Ct. 73 (1996) (affirming exclusion of medical testimony regarding the cause of a heart attack because the expert had offered "neither a theoretical reason . . . [n]or any experimental, statistical or other scientific data from which . . . a causal relation might be inferred or which might be used to test a hypothesis founded on theory"); *Rutigliano v. Valley Business Forms*, 929 F. Supp. 779, 786 (D. N.J.), *aff'd*, 118 F.3d 1577 (3rd Cir. 1997) (excluding medical testimony regarding causation where expert had relied primarily on "expertise and experience"). The cases in which experts have been allowed to testify based primarily on experience have involved the kind of direct factual observations for which this approach may sometimes be appropriate. *See, e.g., Thomas v. Newton Int'l Enter.*, 42 F.3d 1266 (9th Cir. 1994) (reversing trial court's exclusion of testimony from experienced longshore worker regarding what is usually done to prevent falls down open hatches); *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994) (testimony about typical structure of crime families).

[5] *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997).

II. THE "EXPERIENCE AND TRAINING" EXCEPTION TO *DAUBERT* IS AN IMPORTANT ISSUE THAT COULD AFFECT MORE THAN ENGINEERING EXPERT EVIDENCE.

In this case, the "experience and training" exception to *Daubert* allowed a jury verdict based on engineering testimony that did not constitute valid engineering, but the importance of the Fourth Circuit's holding goes beyond engineering. It could result in relaxing the admissibility standard for any expert witness who seeks to venture opinions not grounded in the reasoning and methodology normally used in his or her field.

Engineering testimony based only on "experience and training" should not be admitted into evidence because the engineering profession requires more for the proper evaluation of a design. It is the "profession that puts scientific knowledge to practical use." [6] While scientists concentrate more on making discoveries, engineers work more at solving practical problems, but there is much overlap between the two fields, and present day engineers use science extensively.[7] Thus engineers, like scientists, should be required to provide reasoned explanations when they appear in court as expert witnesses.

Because most courts have applied *Daubert* to expert testimony from a wide variety of fields, the "experience and training" exception could affect far more than engineering or science. Based on a recent WESTLAW search, *Daubert* has been cited in well over 1000 federal and state court decisions in both civil and criminal cases. It has been used to address testimony from fields as diverse as "medicine, real estate appraisal, psychology, accounting, ergonomics, statistics, accident reconstruction, [and] survey evidence." [8]

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[6] 6 THE WORLD BOOK ENCYCLOPEDIA 284 (1991).

[7] E. V. KRICK, AN INTRODUCTION TO ENGINEERING AND ENGINEERING DESIGN 33 (2d ed. 1969).

[8] Black et al., *supra* note 2, at 48-49 (citations omitted).

Thus this case is not just about one tractor accident and one expert witness. It could reverse post-*Daubert* progress in many areas and in many kinds of cases.

CONCLUSION

For the foregoing reasons *amicus curiae* urges this Court to review the Fourth Circuit's ruling in this case, and to reject the supposed "experience and training" exception to *Daubert*.

Respectfully submitted,

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